Virginia Law Register

VOL. 3, N. S.] MAY, 1917. [No. 1

REMOVAL OF WARRANTS ON SMALL CLAIMS.

Section 2939 as amended [1] provides as follows:

> "In every case cognizable by a justice where the amount or thing in controversy exceeds the sum or value of twenty dollars, the justice shall, upon the application of the defendant and upon affidavit that he has a substantial defense thereto, at any time before trial, remove the cause and all the papers thereof to the circuit court of the county or the corporation court of the city wherein the warrant has been brought."

The object of this provision no doubt is to enable a defendant to take the larger and more important matters out of the hands of a justice in order to get the superior advantages afforded by a judge and jury. In some instances it is probable that justice has been meted out to a greater degree as a result of the removal of a warrant, but in many other cases warrants have been removed in order to delay justice rather than to aid it. This is true especially in some of the circuit courts, where such civil matters on the docket are reached infrequently. While it is true that an affidavit of a substantial defense is required as a guaranty of good faith, yet such an affidavit is not regarded seriously by those who wish delay, and consequently it serves as no guaranty of good faith.

As a general rule, in the case of removal of causes and appeals a substantial guaranty of good faith is required in the form of the payment of costs and a bond to answer such judgment as will be given against appellant or remover in the higher court. For example, in an appeal from a judgment rendered by a justice on a small claim under Section 2939, the party appealing has to give bond to answer such judgment as is rendered against him.[2] In the case of removal of warrants, however,

1. Acts of 1916, page 758.
2. Virginia Code, 1904, Section 2947.

not only is no guaranty other than the affidavit required, but on the contrary the plaintiff is required to pay the writ tax in the circuit or corporation court within thirty days from the date when the removal order is made.[3] Should the plaintiff fail to do this the "warrant shall be taken as dismissed and no further proceedings shall be had thereon."[4] So instead of requiring of the person removing the warrant some substantial guaranty of good faith, a penalty is imposed on the plaintiff if he does not take such steps as are required to perfect the removal of the warrant.

That this affidavit is not taken very seriously and is no guaranty of good faith is shown by a recital of the facts in connection with the removal of a few warrants. A small claim was put into the hands of the Board of Trade of one of our cities for collection. When an effort was made to collect on the claim, the debtor wrote a letter to the Board of Trade acknowledging that he owed the claim and asking that he be given more time to pay because of sickness. This time was given, but upon its expiration payment was not made. Thereupon, the Board of Trade placed the claim in the hands of an attorney who had a warrant issued on it. This warrant was removed to the circuit court of the county upon the affidavit of the attorney for the debtor. This happened nearly a year ago, but the warrant has not yet been tried because as a general rule each term since that time has been taken up with criminal matters. Again, after another claim had been put into the hands of an attorney for collection, the debtor voluntarily gave two notes covering the indebtedness, promising at the same time to make payment of each note as it should fall due. He failed to do this and consequently a warrant was issued on each note as soon as it became due. As to one of the warrants the defendants made an affidavit of a substantial defense and removed it to the circuit court of his county, even though he had admitted the indebtedness and given his notes therefor. In the meantime the debtor wrote direct to the creditor again admitting the indebtedness and promising to pay at a certain time, and payment was accordingly made. These removals were made in two different cir-

3. Acts, 1910, p. 510.

4. Acts, 1910, p. 510.

cuits and certainly serve to show that the affidavit is not regarded seriously.

It should be noted that the attorney for the debtor made the affidavit in the first case, and the judge of the circuit court, over the strenuous objection of the attorney for the plaintiff, held that the attorney for the defendant could make the affidavit for removal. No attempt will be made here to show whether that was a proper or improper construction of the act, as this deals largely with a recital of what happens under the removal provision rather than with a consideration of the proper construction of it. This holding of the court, however, gave rise to a situation that would have been highly amusing, had the principle involved not been too serious to afford amusement. It was this: Attorney for plaintiff, at one term of court, moved that the defendant be required to file grounds of defense within fifteen days. By the next term, no grounds of defense had been filed, whereupon attorney for the creditor moved for judgment. The attorney for the debtor, who as attorney had made the affidavit of a substantial defense, sought to excuse his failure to file grounds of defense because his client was too sick to be consulted, consequently he could not ascertain whether his client had any defense or defenses or what they were if he did have any. It would seem that if an attorney is sufficiently informed as to the grounds of defense to make an affidavit that they constitute a substantial defense, he ought to be sufficiently informed to file grounds of defense.

This may seem a small matter, but it is not. Whether a claim is small or large, a creditor is entitled to an opportunity of getting judgment within a reasonable time. His rights are just s much entitled to consideration as those of the debtor, and the latter should not have aids to help him in delaying matters to which he really has no defense. This should be brought to the attention of the Legislature in order that some guaranty of good faith may be required of the person removing the warrant.

Lynchburg, Va. CLARENCE O. AMONETTE.

While not within the scope of Mr. Ammonette's article, it is appropriate to discuss in connection with it the effect of the dis-

missal of the warrant by the circuit or corporation court for failure of the plaintiff to pay the writ tax within thirty days. Where the plaintiff fails to pay the writ tax, the act provides that the warrant "shall be taken as dismissed, and no further proceedings shall be had thereon, but the original paper shall be returned to the justice before whom the warrant was brought, and he shall issue execution against the plaintiff for costs, as a matter of course." Where the warrant has been so dismissed, can the plaintiff again institute proceedings in the justice's court and have another warrant issued, or is the dismissal a final disposition of the cause of action and a bar to any further proceeding?

The question was before one of the circuit courts, and the plaintiff was permitted to obtain another warrant. It is understood that the decision of the court was based upon the principle that the dismissal provided for by statute is in the nature of a dismissal without prejudice or of a nonsuit. If viewed as at common law, and unaffected by statute, the decision of the court is correct, for the dismissal is not a determination upon the merits, and is no bar to a second suit for the same cause, under the doctrine of res adjudicata. In order that a judgment may constitute a bar to another suit, the point in controversy must be the same in both cases, and in the first must have been determined on the merits. An order simply dismissing an action is not a determination on its merits, and so is not a bar to the maintenance of a second action for the same cause. Wilcher *v.* Robertson, 78 Va. 602. See also, Saunders *v.* Marshall, 4 Hen. & M. 455. If the principle of res adjudicata is applicable, the decision is correct. But is this a dismissal in that sense? The dismissal is not as at common law, but is provided for and its effect defined by statute. The statute must be looked to to determine the effect of the dismissal, and the question is to be answered by statutory construction. This is attempted below.

It may be of some importance to determine whether this is a dismissal of an action pending in a trial or an appellate court. If in the latter, the dismissal has the same effect as an affirmance. Code 1873, ch. 178, sec. 18. This applies to the dismissal of an appeal for failure to give the required bond or for failure

to print the record. Hicks *v.* Brick Co., 94 Va. 741; Beecher *v.* Lewis, 84 Va. 630. While the dismissal of the appeal may not prevent the perfection of another appeal, such dismissal must stand as an affirmance of the lower court, until the second appeal is perfected. All the decrees of the appellate court are in their nature final, except possibly where that court disposes of only a part of the case at one term, and reserves it for further and final action at another. Campbell *v.* Campbell, 22 Gratt. 649. See Va. Code § 3475.

This is not, however, a strictly appellate proceeding, but is more in the nature of a removal. "Where the effect of the appeal is to transfer the action to an appellate court in which the case is to be tried de novo, and the controversy is to be settled by a judgment in such court regardless of the judgment appealed from, the appeal operates not only to suspend the judgment of the justice or inferior tribunal, but vacates and sets it aside, so that it can not be used as evidence or as the foundation of an action in any court. An appeal in such case is very different in its effect from a proceeding which seeks to review a judgment by writ of error. In the latter case the judgment is merely suspended, but in the former the judgment is vacated and made ineffectual for any purpose, the judgment in legal construction no longer remains in force and can not be the foundation of a new action." Evans *v.* Taylor, 28 W. Va. 184. "An appeal from a justice is, more accurately speaking, a removal of the cause, and not an appellate procedure." Elkins *v.* Michael, 65 W. Va. 503. 64 S. E. 619. This may be considered in the nature of an original proceeding, in which a dismissal does not bar a second action, if the statute does not prevent. The statute itself must determine this.

It may be suggested that the provision requiring the payment of the writ tax is in the nature of a limitation, and, if not complied with, the plaintiff's right is lost. It is held that the supreme court of appeals cannot inquire into the merits of a case on appeal where more than the statutory period has elapsed since its rendition. Cocke *v.* Gilpin, 1 Rob. 20; Fleming *v.* Bolling, 8 Gratt. 292; Thorntons *v.* Fitzhugh, 4 Leigh 209. It is settled by the decisions in West Virginia that unless 'good

cause" appears in the petition for the failure to take the appeal within ten days as prescribed by § 174, ch. 50 of the W. Va. Code, the appeal must be dismissed by the circuit court as improvidently awarded. Section 174, ch. 8, Acts 1881; Code, 1899, ch. 50 § 164; Lowther *v.* Davis, 33 W. Va. 132, 10 S. E. 20. The statute under consideration makes no provision for excusing failure to pay the tax by showing good cause. The provision is absolute.

Upon the affidavit of substantial defenses under § 2939 of the Code, as amended by the Acts of 1916, p. 758, 4 Va. Code. 445, the cause and all papers are removed to the circuit or corporation court and docketed there. There is no provision in this section nor elsewhere in the Code under which the cause can ever be again returned to the justice's court, except under the provision of the Acts of 1910, p. 510 for the return of the original papers upon which execution shall be issued against the plaintiff for costs. Can it be contended that under the provision for the return of the cause and papers for the issuance of the execution for costs as a matter of course, that after the return there can be a trial upon the whole cause of action, and that the full powers of the justice of the peace have been restored? It would seem that under § 2939 the whole cause of action is forever removed from the justice's court, and can be returned thereto only for the purpose of issuing execution against the plaintiff for costs as provided by the Acts of 1910.

The act provides that "Upon affidavit of substantial defense, the plaintiff shall, within thirty days from the date when such removal order is made, pay to the clerk of the circuit court of the county or of the corporation court of the city wherein the warrant has been brought, the proper writ tax as fixed by law, and in the event of his failure to do so said warrant shall be taken as dismissed, and no further proceedings shall be had thereon, but the original paper shall be returned to the justice before whom the warrant was brought, and he shall issue execution against the plaintiff for the costs, as a matter of course." Acts 1910, 510, 3 Va. Code 973.

In the enactment of this provision some definite and material purpose must be attributed to the legislature. The only way to

construe the provision as of material force is to construe it to be in the nature of a limitation and that the penalty imposed upon the plaintiff for his failure to comply therewith is the loss of his right of action altogether, and not that the action on the warrant is dismissed without prejudice and that he stands as though he had been nonsuited. It would seem improbable that the legislature would take the trouble to provide that a plaintiff in a small-claim case should be merely nonsuited and amerced for costs. Such construction would not tend to expedite or facilitate judicial procedure and would not give any material and beneficial effect to the statute.

Again, it would seem that the provision of the Act of 1910 "that the warrant shall be taken as dismissed" and the provision that "the appeal shall stand dismissed and the original papers shall be returned to the said justice, and the judgment of the justice shall be confirmed, and the justice shall enter judgment against any surety given at the time of appeal as a matter of course," being parts of the same act and relating to a similar subject matter, should be construed together and be given the same force and meaning. The provision relating to appeals uses "dismissed" in the sense of affirmance, else the judgment of the justice could not be confirmed and judgment could not be entered against the sureties as a matter of course. Evidently the legislature intended that the provision for dismissal in cases of removal on affidavit of substantial defenses should have a similar meaning and effect. It would seem, therefore, that when the warrant is dismissed by the circuit or corporation court the dismissal is a final termination.

T. B. B.